TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 629 25

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 15, 1929

CERTIORARI GRANTED FEBRUARY 25, 1929

(33,938)

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TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF VIRGINIA, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday of May, being the 7th day of the same month, in the year of our Lord one thousand nine hundred and twenty-seven.

Present: The Honorable D. Lawrence Groner, Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

LIBEL.

(2) Filed March 16, 1927.

C. A. Lindgren, Administrator of Estate of C. E. Barford, Deceased, Libellant.
v.
Colonna's Shipyard, Incorporated, a corporation, and United States of America, Respondents.

In Admiralty. No. 4655.

To the Honorable D. Lawrence Groner, Judge of the Court aforesaid:

The libel of C. A. Lindgren, administrator of the estate of C. E. Barford, against Colonna's Shipyard, Incorporated, a corporation, and the United States of America, in a cause of tort and death by wrongful act, civil and maritime, alleges as follows:

First: That C. E. Barford who died on October 5th, 1926, was a citizen of the United States and a resi-

dent of the City of Norfolk, Virginia, and that C. A. Lindgren duly qualified in the Circuit Court of the City of Norfolk, Virginia, as administrator of the estate of the said C. E. Barford, deceased, on the 14th day of January, 1927.

Second: That Colonna's Shipyard, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal office in the City of Norfolk, Virginia, and engaged in general docking and repairing of ships, and the United States of America was at all the times hereinafter mentioned, and now is the owner of the steamship "Hybert", a large and valuable steel ship employed as a merchant vessel and lying at the port of Houston, Texas, at the time of the filing of this libel.

(3) Third: That on October 5th, 1926, at about 1:30 P. M., the said C. E. Barford was engaged in his duties as Third Mate, and as such a seaman on said steamship, which was then in the drydock of the said Colonna's Shipyard, Incorporated; that shortly before the incidents hereinafter recited he had been ordered by the Chief Officer of said steamship to secure the measurements of a small ball and catch which blonged in the bottom of the life boats of said steamship; that in order to secure the exact measurements of said ball and catch, said C. E. Barford crawled or climbed into life boat #4; that said life boat at that time was swinging on the vessel's davits over her port side aft of amidships and suspended over the said drydock, and two members of the crew of said steamship were engaged in storing or putting in place the bottom boards of said life boat; that due to the defective hooks, blocks or fastenings of the lines between said life boat and said davits, the negligent, careless and improper manner in which said life boat was fastened to the same and the careless, negligent and wrongful manner in which said life boat was swung over the side of said steamship above said drydock, one end of said life boat suddenly became released in such a manner as to cause said life boat to swing downward alongside said steamship and to throw or *preicipate* without warning the said C. E. Barford from the said life boat to the drydock a great distance below so forcibly and violently as to instantly cause his death.

Fourth: That the decedent at the time he met his death as aforesaid, was strong, well, in good health and able to follow his vocation in life, and was earning good wages, all of which will be shown at the trial of this case.

Fifth: That by reason of the premises the estate of the said C. E. Barford, deceased, and your libellant as administrator of the said estate, for and on behalf of the decedent's dependents and heirs, are entitled to recover the su mof Tem Thousand ($10,000.00) Dollars, damages for the death of the said C. E. Barford, caused by the wrongful act of these respondents.

(4) Sixth: That the death of the said C. E. Barford and the events resulting in his death were due to no negligence or want of care on the part of the said decedent, but were occasioned solely by the fault, negligence, wrongdoing and want of care on the part of these respondents, their officers, servants and employees in the following particulars:

As to the said Colonna's Shipyard, Incorporated:

(1) In carelessly and negligently swinging said life boat on the davits of said steamship and over the side of said steamship and suspended above the drydock a great distance below, and permitting the said life boat to remain in such position, thereby incurring liability for damages to said life boat or injuries to the members of the crew of said steamship while performing the duties required of them in said life boat;

(2) In carelessly and negligently failing to return said life boat to its proper place upon the deck of the said steamship after the purposes had been accomplished for which it had been swung over the side of said steamship, and over the drydock below;

(3) In failing to carefully inspect the lines, hooks, blocks and fastenings between said life boat and the said steamship's davits before swinging said life boat over the side of said steamship and above the drydock below in order to guard against the same breaking or becoming released or unfastened;

(4) And in such other and further particulars as will be shown at the trial of this case.

As to the United States of America:

(1) In failing to use due and proper care to provide a reasonably safe place for the decedent to perform the duties required of him;

(2) In failing to furnish, provide and maintain good, strong and adequate lines, fastening, blocks and hooks between the davits of said steamship and the said life boat sufficient to bear the weight of said life boat and members of the crew required to work therein;

(3) In failing to properly inspect the said lines, fastenings, blocks and hooks between the davits of said steamship and said life boat;

(5) (4) In failing to warn and caution members of the crew required to work in said life boat and to store or place the bottom boards therein, of the existence of a patent or automatic catch or release under the seats or by the pontoons of said life boat which, when struck, released the said life boat from its fastenings and permitted the same to fall from the davits of said steamship;

(5) In failing to instruct the members of the crew of said steamship as to the safe manner in which to store the bottom boards of said life boat, and to avoid striking and releasing the patent or automatic hooks or catches through which were fastened the lines between the davits of said steamship and said life boat;

(6) In negligently and carelessly requiring members of the crew of said steamship to work in said life boat while the same was so suspended over the side of said steamship and above the drydock below;

(7) In not exercising the degree of care required by law in failing to return said life boat to the deck of said vessel before members of the crew were ordered therein for the purpose of storing boards;

(8) In failing to furnish a competent master, officers and crew on said steamship for properly performing the duties required of them thereon, and particularly a chief officer who through incompetence permitted members of the crew of said steamship to engage in storing bottom boards in a life boat containing patent and automatic hooks, releasing it from the davits of said steamship while said life boat was suspended over the drydock in which said vessel then lay, and in permitting the Third Mate on said steamship to enter said life boat for the purpose of securing for the said chief officer the measurements of a certain ball and catch therein;

(9) And in such other and further particulars as will be shown at the trial of this case.

Seventh: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your libellant prays that citations, in accordance with the laws and practice of this Court, may issue against these respondents, citing them to appear and answer all and singular the matters aforesaid; that this *libellnat* may have judgment for the amount of damages alleged in the libel with interest and costs, either severally or jointly against the Colonna's Shipyard, Incorporated, and the United States of America; that any (6) judgment against the United States of America shall be in accordance with the provisions of the Act of Congress of March 9th, 1920; and that libellant may have such other, further and general relief as to the Court shall seem just.

C. A. LINDGREN,
Administrator of the estate of C. E. Barford, deceased, Libellant.

LUCIAN B. COX,
KELSEY & JETT,
Proctors for Libellant.

State of Virginia,
City of Norfolk, to-wit:

C. A. Lindgren, being duly sworn, deposes and says that he qualified as administrator of the estate of C. E. Barford, deceased, on the 14th day of January, 1927, and that the matters and things stated in the foregoing libel are true to the best of his knowledge, information and belief, and as to such matters stated upon belief, he believes them to be true.

C. A. LINDGREN.

Subscribed and sworn to before me this 8th day of March, 1927.

WILFRIED P. BOOKER,
Notary Public.

Commissioned as Wilfried Price.

(7) **INTERROGATORIES PROPOUNDED TO THE RESPONDENT, THE UNITED STATES OF AMERICA, TO BE ANSWERED IN WRITING AND UNDER OATH:**

Annexed to Libel.

1. State the date that C. E. Barford joined the steamship "Hybert", whether or not he was acting as Third Mate at the time of the accident referred to in the libel, and the amount of wages the said C. E. Barford was then receiving.

2. Produce and file the shipping articles of the said steamship "Hybert", if any, for the voyage for which the crew then on board the said steamship had been employed.

3. State the name of and describe the patent release

installed on life boat #4, then on the steamship "Hybert".

4. State the name of, age, previous sea-faring experience, if known, and capacity of the two seamen who were in the life boat of the steamship "Hybert" on October 5th, 1926, which fell from its davits, causing the death of the libellant herein and the said two seamen.

5. State when the said two seamen were employed or signed articles on said steamship, who employed them and what officer ordered them to store or put in place the bottom boards of said life boat, and what, if any instruction or warning was given them with reference to the manner in which this work was to be done.

6. State the name and address of the boatswain, or who was acting as boatswain, on said steamship at the time of the said accident.

7. State the address of Anthony Steeghs and John Dillon, seamen of said steamship, and the name and address of the Second Mate on said steamship.

8. State the names and addresses of the officer and members of the crew of said steamship who rigged the blocks and falls of said life boat and hooked them on just a few hours prior to the accident.

(8) What inspection and repairs, if any, were made to the tackle of said life boat, and by whom made, after a report had been made by John Dillon to the boatswain that the tackle, blocks and hooks were defective or improperly fastened.

10. State the approximate length, breadth, depth, weight, capacity and metal of which life boat #4 was constructed.

11. State who swung said life boat over the side of said steamship and for what purpose and for whose benefit it was so swung.

ORDER FILING ANSWER OF COLONNA'S SHIPYARD, INC.

(9) Entered and filed October 17, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

C. A. Lindgren, administrator of estate of C. E. Barford, deceased,
vs.
Colonna's Shipyard, Incorporated, and The United States of America.
} In Admiralty.

On motion of Colonna's Shipyard, Incorporated, leave is granted it to file its answer in this cause, and the same is accordingly filed.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Va.

ANSWER OF COLONNA'S SHIPYARD, INC.

(10) Filed October 17, 1927.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of said Court:—

The separate answer of Colonna's Shipyard, Incorporated, one of the respondents, to the libel heretofore filed in this cause alleges as follows:

First;—It is ignorant of the matters and things alleged in the first article of the libel and can therefore neither admit nor deny the same, and calls for proof.

Second;—It admits the allegations of the second article with respect to the incorporation and existence of

this respondent; and as to the other matters therein contained, it believes them to be true.

Third;—Except for its knowledge that the life boat referred to in the third article was hanging in its davits over the side of the ship and that C. E. Barford fell therefrom and sustained injury resulting in death, this respondent is ignorant of the matters and things alleged in said article and can neither admit nor deny the same, but calls for proof.

Fourth;—It is ignorant of the matters alleged in (11) the fourth article of said libel and can neither admit nor deny the same, but calls for proof.

Fifth;—So far as this respondent is concerned, the allegations of the fifth article are denied.

Sixth;—This respondent denies the charges of negligence alleged against it in the sixth article, and denies the breach of any duty owed by it to the libellant.

Seventh;—It admits the jurisdiction but denies that all and singular the premises are true.

And having fully answered, it prays to be hence dismissed with its reasonable costs.

COLONNA'S SHIPYARD, INCORPORATED,
By BENJ. O. COLONNA,
Vice-President.

HUGHES, LITTLE & SEAWELL,
Proctors.

Subscribed and sworn to before me this 14th day of October, 1927.

JULIA K. GOFF,
Notary Public.

ORDER FILING EXCEPTION OF THE UNITED STATES TO LIBEL.

(12) Entered and filed October 17, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased,
vs.
Colonna's Shipyard, Incorporated, and the United States of America,
} In Admiralty.

On motion of the United States, by its counsel, leave is granted it to file its exception to the libel in this cause, and the same is accordingly filed.

D. LAWRENCE GRONER,
U. S. District Judge.

EXCEPTION OF UNITED STATES TO LIBEL.

(13) Filed October 17, 1927.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of said Court:

The United States, one of the respondents in the above entitled cause, excepts to the libel heretofore filed herein.

And for grounds of its exception it shows:

That it appears from said libel that this is an action for damages for personal injuries resulting in death; that the Constitution reserved to Congress exclusive jurisdiction in admiralty, saving only to suitors their common law remedy where the common law was competent to give it; that neither by the common law nor in admiralty was there a right of action for damages for personal injuries resulting in death; that while in the

absence of action by Congress the Federal Courts adopted and administered the death statutes of the State of Virginia, yet that Congress has now legislated upon the subject by the Act of March 30, 1920, and by the Act of March 4, 1915, section 33 of which last named Act providing a remedy in such cases, which under the Constitution is exclusive, and therefore the statute of the State of Virginia creating a right of action for damages resulting in death does not apply, and libellant has failed to state a cause of action against this respondent.

HUGHES, LITTLE & SEAWELL,
Of Proctors for the United States.

ORDER OVERRULING EXCEPTION OF THE UNITED STATES TO LIBEL.

(14) Entered and filed October 21, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased,
vs.
Colonna's Shipyard, Incorporated, a corporation, and United States of America.
} In Admiralty.

This cause came on this day to be heard upon the libel and the exceptions of the United States of America thereto, and the Court having fully heard the argument of proctors upon the said exceptions and being of the opinion that the same should be overruled;

It is ordered by the Court that the exceptions of the United States of America to the libel heretofore filed herein be, and the same are hereby ovrruled, with leave to it to answer.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Virginia.

ANSWER OF UNITED STATES TO LIBEL.

(15) Filed October 22, 1927.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of Said Court:

The answer of the United States of America, one of the respondents, to the libel heretofore filed in this cause, without waiving its exceptions to said libel, heretofore filed, alleges as follows:

First:—It is ignorant of the matters and things alleged in the first article of said libel and can neither admit nor deny the same; but calls for proof.

Second:—On information and belief it admits the allegations of the second article to be true.

Third:—On information and belief it believes the recitals of fact contained in the first part of the third article to be generally true and that C. E. Barford was precipitated from one of the life boats to the dock, as a result of which he died; but it denies each and every allegation with respect to the condition of hooks, blocks or fastenings of the lines and each and every allegation of negligence contained in said article.

(16) Fourth:—It is ignorant of the matters and things alleged in the fourth article of said libel and can *neither* admit nor deny the same; but calls for proof.

Fifth:—It denies the truth of the matters contained in the fifth article of said libel, or that libellant is entitled to recover the sum of ten thousand dollars from this respondent by reason thereof. On the contrary, while repeating its denial of any liability whatever, it avers that in any event it would not be liable to damages in excess of the proven dependency of such dependents as said C. E. Barford may have left surviving him.

Sixth:—It denies the charge of negligence against

it made in the sixth article of said libel and in each specification thereof, and avers on the contrary that it had fulfilled its full duty to said decedent in the premises.

Seventh:—Answering the seventh article of said libel it admits the jurisdiction but denies that all and singular the premises are true.

Eighth:—And further answering this respondent says that at the time of the accident in the libel mentioned the steamship Hybert was upon the floating dry dock at the yard of Colonna's Shipyard, Incorporated, in the harbor of Norfolk, being reconditioned and put in order for services, certain employes of said shipyard being engaged in painting the vessel and others in caulking her decks, while certain of the crew of the vessel were engagd in rigging the life boats on the upper deck and getting them in shipshape condition ready for inspection. That some time during the forenoon of said day the blocks and falls to the No. 4 life boat on the port side of the upper deck of the vessel had been rigged and made fast to the davits and to the respective ends of the boat, which was then lying in the chocks on deck, and that thereafter the shipyard's caulkers, for the purpose of getting at and caulking the deck under said life boat, hoisted her in her davits and pushed her out over the side of the steamer where she had hung on the davits for some time before the accident occurred: That in the course of their duty two of the seamen some time after (17) the lunch hour went to said life boat, got in it and were engaged in re-laying the bottom-boards at a time when the chief and third mates approached and the latter of his own accord got into the boat for the purpose of obtaining its dimensions with a view to obtaining a supply, and was in the act of stooping down to get it when the after end of the boat for some cause became loosened from its fall and dropped, precipitating the decedent to the dock causing his death. Respondent further says that said boat was an iron boat, about 24 feet long, 7 feet 8 inches beam and three feet depth with a cubic capacity of 376 feet, which with its hangers was in good order and condition and properly rigged to its davits, said hangers being of standard make and in common use; that said boat had been hanging from its davits

for some time before the accident, and respondent is ignorant of the cause of its after end becoming disengaged; but, if it was due to any negligence of the members of the crew already in said boat, such negligence was that of a fellow servant for which this respondent should not be liable.

And having fully answered it prays to be hence dismissed with its reasonable costs.

THE UNITED STATES,
By H. H. RUMBLE,
Special Assistant to the Attorney
General in Admiralty.

HUGHES, LITTLE & SEAWELL,
Of Counsel.

TESTIMONY IN NARRATIVE FORM.

(18) Filed February 16, 1928.

C. A. LINDGREN, the Libellant, being duly sworn as a witness in his own behalf, testified as follows:

Direct Examination.

My name is C. A. Lindgren. I am administrator of the estate of C. E. Barford, deceased. The certificate now presented is a certificate of my qualification issued by the Clerk of the Circuit Court of the City of Norfolk.

Note: The certificate was received in evidence marked "Exhibit #1".

I qualified on January 14th. Mr. Barford was my wife's brother. My wife has been dead two years. Mr. Barford's heirs are my two children, who are eighteen and nineteen years of age. Mr. Barford lived with me. He was never married and lived with us all the time. He had no other brothers and sisters.

JOHN LUMFORD.

CROSS EXAMINATION.

Mr. Barford was about 49 years of age. I don't know how long he had been going to sea. He had been on a boat about 20 years. As a seafaring man he spent most of his time on the water. When he was ashore temporarily, he made his headquarters at my house.

RE-DIRECT EXAMINATION.

Prior to this accident, he worked for the Old Dominion Transportation Company between Norfolk and New York. He was running on the Richmond boat about fifteen—eighteen years and was transferred to the New York boat. He had been with the Old Dominion about twenty years. It was just shortly prior to his death that he left that company. This was because they laid off men because there wasn't any work to do.

(19) JOHN LUMFORD, a witness for the libellant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I worked for the Colonna Shipyard, have worked over there about twenty years. My job is leading man of the caulkers. I worked on the steamship Hybert. She was at No. 4 dock. That is a large dock. I went to work on her on the morning of October 5th, the time of this accident. The first work I did was caulking all three decks, the boat deck and both bridge decks. The boat deck is the deck where the life boats are swung. After we worked up to the life boats, there wasn't any falls on the boat. I asked the ship's officer if he would put the falls on and he did. That was about half past nine. Between 10 and 10:30 the falls were on. I asked him were they ready. He said, yes. I knew that myself because I looked at them. Then we wound the boats out so we could caulk under them. We wound them out with a lever. It's a patent davit. After the falls is on, there is a strain to the fall. You wind the lever. The davits will carry the boat off. It was between 10 and 10:30 that we swung the life boat over the side. This was the after life boat on the port side. I didn't notice

the number. We finished caulking some time the next day. We didn't finish it that day. We swung the life boat out something like 10 or 10:30. I am satisfied it was 1 o'clock or after when the accident happened. I didn't see the accident. At that time I was on the deck. I couldn't see a thing. I didn't know it was a accident until someone called my attention to it. I got permission to swing the life boat out from the ship's officer, (20) from Mr. Richards, the first officer. He said he would put the falls on the boat, see they were on, and he did put them on. I went back there again at 10 or 10:30. I asked him was they ready. He said, "Yes, wind them out". I noticed was they on right and they was on right. I don't remember whether he said anything at that time that we would have to wind them out on our own responsibility. I didn't see the accident until it was all over and I didn't finish caulking until the next day. The boat was swung out there on the davits from 10 to 10:30, something around that. When the accident was. So far as I know nobody touched it in the meantime.

CROSS EXAMINATION.

I examined the falls and things when I went to put it out. It was properly rigged. Blocks and falls appeared to be in good condition and properly hooked on. As a matter of fact I did turn it out and it stayed out there for several hours before the accident. After lunch the caulkers went up and turned to at 12:30. I got up there something around 1 o'clock, little after. I noticed there was three or four men in the boat working. What they were doing, I don't know. The boat was then in the same position in which I had left it. Hadn't been let down any. The boat must have been flush with the deck. She was off far enough for us to work that spot after she was wound off. It was necessary to move the boat in order to do the caulking under the boat and alongside of it. We have always been doing it that way. It was necessary in order to get under the boat to caulk. We swing them out and leave them hang on the davits. That is the regu- (21) lar way of doing it. I have been doing it that way for twenty years. After we got the boat swung and made

fast swinging on the davits, neither I nor any other man of Colonn'as had anything further to do with it.

RE-DIRECT EXAMINATION.

If nobody else is working I see that the boat is swung back in the rack before I leave, after I finish caulking.

Q. You, of course, don't know whether any other employee of Colonna's had anything to do with this boat. You couldn't have or you didn't see them have anything to do with it. A. Where we was working at nobody or the ship's crew or our men had any business up there.

RE-CROSS EXAMINATION.

The moving of the boat out and the moving of it back is under my direction as foreman after I get permission. The work up there had not been completed at the time of this accident. I don't know how long the men had been working in the boat when I got up there. I did notice them when I went up after lunch.

(22) CHARLES G. RICKARDS, a witness for the Libellant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I was First Officer on the steamship Hybert at the time of this accident. I had been going to sea since 1912. I hold a master's license, ocean unlimited. I was First Officer on the steamship Hybert. I knew Mr. Barford. As far as I can remember he came on duty that morning for the first time. I don't remember the date when I went on duty on the steamship, but it was the Sunday before. When she came in dock I went aboard her. Mr. Barford came on duty the morning of the accident for the first time. The other two men in the boat came on duty during that morning. All three were killed the first day they came on the steamship. Mr. Barford's wages were, I think, $125.00 a month. His job was Third Officer. We call it in that position where we are on a spot job as we call it, it was known as third assistant ship keeper. Ship under way, in commission, he would

be third officer. This ship had not yet been put in commission. The other two men were seamen. According to the tickets that were sent with those men to the ship, they were A. B.'s. The ship was in dry dock at Colonna's Shipyard. The ship is a U. S. Shipping Board vessel owned by the United States. She was in the large dry dock and she was on the ways at the time this accident occurred.

(23) On the morning of the accident Lumford asked me first if I would put the falls on the life boat that day. He told me he wanted to caulk under it. I told him, yes, we would put them on. Then he came to me again after we put the falls on and wanted to know if I was going to push the boat out. I said, "No, we have all the work we can do, that's your job". That's the very words I told him. So he went to work and pushed it out. The only rule we had on board the vessel why we didn't put the life boats over for the men, was we were just too busy to do it. That's really their job when they do it for their work. This would be life boat No. 4 if she were in commission. Port side aft. I cannot say what time the boat was swung out. I can't say the exact time when these men were placed in the boat to work, but when I went up there about quarter past one or twenty minutes past one they were in the boat at that time. Mr. Barford walked up to the boat with me at that time. He said he wanted a measurement of a rubber ball that goes in the drain in the bottom of the life boat. He and I walked to the side of the life boat together. Two men were in there at the time placing the bottom boards. Mr. Barford climbed in. He climbed into the forward end. I was standing at the forward end, leaning against the boat watching him get the ball out, leaning against the side of the life boat. She was swung out on her davits. Her keel lay about flush with the deck. She was swung out far enough for the rail to be clear the side of the ship. Just far enough to swing clear in case she was lowered. Nothing happened when Mr. Barford climbed in the boat. After he had gotten in the boat and in the bottom of it and reached for the ball, why, the boat just turned loose on the after fall and fell. The whole boat didn't fall, just one end fell. It hung on the forward end. The fall didn't part. The releasing gear must have disengaged.

(24) The boat swung down and when it did all three

men were thrown from the boat. We found them on the dry dock below. I pretty nearly fell too. I saved myself by throwing myself backward. I went down on the dock and saw the men after they fell. All three were dead. There was two on the dock and one in the water. Mr. Barford was on the dry dock itself. The release lever of the gear was in the after part of the boat. Mr. Barford was in the forward end. He was nowhere near the release gear. The two seamen were in the after end of the boat. The release gear is a pull gear with a chain. It takes some little effort to pull it. It doesn't work easily. The life boat was, I think, a 37 passenger boat. I don't know how long it would be. These life boats were removed from the vessel after the accident. They were placed down at the Army Base. I have seen them within the last few days. The life boat down at the Army Base which fell is the one that set out in the floor. The one against the wall was completely fitted up. The one on the floor was not. We had four life boats on the Hybert. We removed the two after life boats. The vessel sailed with two forward life boats. I didn't go on her. I remained in Norfolk. The forward and after life boats were not fitted with the same release gear. The forward boats were fitted with just what I would call a bar gear. Has a lever in the bottom that fastens down with a pin. The release gear in the after boats was an automatic gear. The *apprxoimate* distance from the life boat to the dock where the men fell was 50 to 60 feet. Mr. Barford was not securing this ball at my orders. I didn't order him to get the ball. Captain Young asked him to get a measurement of the hole so we could get a ball to fit, and we had already gotten a measurement (25) with a stick on one of the forward boats, and as we walked to this after boat Mr. Barford noticed a ball in this hole. He said, "There's a ball that will fit, I know, so I will get that for a measurement". That is why he went in the boat.

Mr. KELSEY: That is all.

Mr. LITTLE: I will say with respect to the boat being at the Army Base and being taken off the ship it was done under my instructions so that the boat might be available to any court or jury who might desire to examine it, there being a serious accident causing, as your

Honor has heard from the testimony, the death of three men and injuring the painted who was alongside. As a matter of precaution I got the Shipping Board to take the boat off the ship and keep it at the Army Base where it could be seen by a court or jury if it was so desired at the proper time.

(26) This ship has been up at Camp Eustis, out of commission. And was at Colonna's Shipyard at the time of this accident being made ready for sea. And in the doing of that on the morning of this accident we had the boats rigged for inspection by the inspectors. The blocks and falls of No. 4 life boat had been properly rigged before she was hauled out by Lumford. The blocks and falls were in good condition. And the davits were in good condition. And the releasing gear and everything was O. K. as far as I could see. The blocks and falls were properly rigged to the releasing gear—the boat would not hang on that if it wasn't properly fastened. It is a fact that in order to release gear in the ordinary process you have to pull a chain in order to trip the lever. The men in the boat had nothing to do with the releasing chain. The chain or rope that holds the boat and that is attached to the cleat is an automatic releasing gear altogether. It is hooked into an eye bolt on the fall. The releasing gear is attached to the boat (or bolt). I do not know the make of the releasing gear. The releasing gear is a part of the boat itself. The falls are rove through the blocks and one block is put up near the davit. And the other block has a ring bolt in it that hooks in the hook of the releasing gear. The boat when lowered to the water is lowered by means of the falls from the deck. When it hits the water by means of this particular releasing gear, it is released by pulling the chain. The sailors had nothing to do with pulling the chain at the time of the accident. We could not see from where we were what caused the release of the boat. There was no warning of any kind. It just simply snapped and fell. I had all I could do to keep from falling with it. I didn't see any of the men hit
(27) anything or do anything. At the time it fell I was looking down in the bottom at the forward end. I wasn't looking aft at all. It snapped so quick I didn't have a chance to see what became of the men. I throwed

myself backwards and fell on the deck myself. There isn't anything unusual in my experience as an officer of the ship in hanging a boat on the falls on the davits and putting it outboard. It is a very usual and ordinary thing to do. There isn't anything unusual in men going to work in a boat which is hanging on falls. I have done it myself more than once.

RE-DIRECT EXAMINATION.

If a release gear on these boats is pulled both ends are disengaged. They are all connected with one chain. That chain runs around under the seat. When the boat is swung out its equilibrium is maintained because it is hung from both ends. The release gear works on one lever from the inside of the boat. But the lowering gear—it has to be lowered from two falls to get it to the water. It is the same old style lowering gear. It is simply the releasing gear that is automatic. The boat is held at a certain position if you want to lower it from one deck to another deck with falls on to the cleats on the davits. When the boat is first swung out it requires two men, one at the forward end and one at the after end. In order to hold the boat in the particular position in which it is then, in the first place when you rig your falls up you make them fast—pull them up as taut as you can get them and make them fast to the cleat on the davit. Then it has a worm gear to roll the boat out. (28) As you turn this lever on each end that shoves the boat out at the same time holding it off the deck. The boat is lowered by the falls from the deck, one man at each fall. When you have gotten it to the position at which you want to hold it, it is fastened to a cleat on the davit. They are on the deck any where you want to fasten it. The running end of the fall is fastened. It is a rope. He ties the rope to a cleat, just as in the old way.

RE-CROSS EXAMINATION.

No part of the blocks and falls had given way or become loose at the time of this accident. They had been made fast—the end of the fall—to the cleat and stayed in that position. It was something in connection with

the releasing gear in that boat which released the boat and let the end of it fall. There is a ring at the bottom of the falls through which a hook goes and the hook which goes through that ring is a part of the releasing gear.

(29) WILLIAM G. LARMOUR, a witness for the libellant, being duly sworn, testified as follows:

Mr. KELSEY: Counsel for respondents has agreed that if we called Mr. Calcott, a mechanical engineer, that he would testify that he made a drawing of this gear and that this print is a blue print of that drawing. That the blue print marked "Boat fall release as installed on after boats S. S. 'Hybert'" is the drawing referred to.

NOTE: Blue print of release gear was received in evidence and marked "Exhibit 2".

DIRECT EXAMINATION.

I am connected with the Old Dominion Marine Railway at Norfolk. My position there is manager. I have been Manager of that railway for 11 years. I started in shipbuilding and transportation in 1887 and have been at it ever since. I am 57 years old. I have been connected with the Grand Trunk Railway; Detroit Dry Dock Company; Norfolk Southern Railway. My position with the Norfolk Southern was Marine Superintendent. With the Norfolk Marine Railway and with the Old Dominion Marine Railway. I examined the life boat and life boat releasing gear on the life boat sitting in the center of the warehouse away from the wall in the warehouse at the Army Base. That was the boat that was pointed out to me as the life boat which fell from the steamship "Hybert". I made a rough drawing and took measurements of the release device. The blue print handed me marked "Boat fall release as installed on after boats S. S. Hybert" is a correct drawing of that device. That device is known to be the Broady release gear. I inspected (30) it with the idea of determining whether or not it was in good condition or properly installed. I found out with reference to the installation of the device that the

counter weight ball as shown on this drawing for the purpose of bringing the release gear back into locking position fouled a thwart or seat in the boat. That thwart had been cut out to allow that ball to drop back into its position, but it was not at the center line of the gear and it fouled it on the port side. So it didn't allow the ball to drop back. The particular release gear I am speaking of is the after release gear of this life boat. The way that ball fouled it and the effect it had when it fouled that seat was, the ball is pivoted on this part of the release gear. This ball is a counter weight to carry this part of the gear back and throw this part back in position so these three pins are supposed to come in line and form a lock. It is a toggle gear. When these pins are not in line it makes a hair trigger and that is about what the trouble with the gear was. The way it was adjusted, the way I see it, it was actually a hair trigger and as sensitive as any spring trap that ever could be devised. In the description of the patent it specifically states that these three pins are to be in line. I found them out of line. You can understand what I mean by a toggle gear by doing a little kindergarten work. The ball is connected here. That puts a strain on this connection. It is opposed by this pin. These are stationery pins. These plates are fastened to the stem of the boat. These shown in green are movable. They fly in releasing position as shown here. Then the hook capsizes and turn everything loose. The counter weight goes up to that position. Here is the chain by which the gear is released—pull chain. When it is engaged it is coiled around that quadrant. When it is released the whole thing flies around (31) as shown here. Assuming those pins were not in alignment but were out of alignment as is indicated on this drawing, that is to say, the red pin was not in alignment with the two green pins marked 9a and 12, I can only show you how that would have the effect of capsizing the hook so as to release that. Suppose your finger was the line of these pins. One knuckle joint is this joint. Here is the pressure underneath. As long as your finger is straight up and down and in line like those pins are supposed to be it won't turn over. The minute you get it out of line, you get that. The least bit off that line. This pin travels on a radius on that line and comes out in this direction. Travels from that point

to that. Swings around a radius on that center. After I discovered the hair trigger device, I tried it just with the pressure of my hand. That is all I could do with that, with the ball engaged on the thwart as I tried to show where the ball fouled the thwart. You could release the pin then by pressure of the hand. The ball I speak of is this counter weight. The seat was cut out—a half circular opening cut in the seat, but it was off center so the port side of the ball fouled the seat; it didn't drop down in the opening it was cut for. But the gear had more or less play and by forcing it over you could force it down so the gear would come more nearly in line and then you couldn't lift it. With the ball naturally tripping and fouling that seat you could release the gear. In that position there would not be enough strength there to sustain a great deal of weight. The thwart in my opinion looked as if it might have been a special thwart put in there to carry the sheave underneath. Through which this release chain was passed. It looked as if this thwart had been put in for the purpose of carrying (32) the sheave through which the releasing chain passed to connect with this gear. I couldn't say for certain that is the case. This thwart was not a part of the after seat. There was a tank—an air tank—right forward of that. There was a short thwart just in the peak of the boat there. I am not sure whether that thwart was on the same level with the after seat or not. It looked to me as if it had been placed in there after the boat had been built. It was built that way to accommodate this sheave. That lifeboat was unseaworthy with the device I found installed in there to the extent that it wasn't in proper shape to be loaded with passengers because it would likely dump the passengers out as in this case. So far as the boat itself was concerned, the boat looked to be perfectly seaworthy. This device doesn't lock unless the ball goes all the way down. The thwart, as I have already mentioned, which was in the after part of this life boat would foul this gear—keep it from—the ball from dropping all the way down and locking the device. If the release handle of that gear had been pulled it would have released both ends at the same time. I could not state whether or not, by merely taking a casual glance, the ball had fallen all the way and the device was locked.

ERNEST POSEY.

CROSS EXAMINATION.

I have never worked one of those gears. If the counter weight ball was against the port side of that aperture in the thwart it would make a hair trigger effect in the releasing gear. Under the conditions I found it in, it would trip at once. You could trip it with your finger under those conditions. I found the boat lying on its side there at the Army Base. It was listing to the port side. I made my examination, I think, last Thurs-
(33) day or Friday. Friday, I think. The Friday of this past week. If you took this counter weight ball and put it through the slot, it wouldn't fall naturally into position. You had to force it over and there was enough slack in the gear so you could force it down in the opening. The other end was on the same list and that was perfectly all right. But this one had an accident. If you drop the ball—counter weight—through this aperture to the thwart—through this semi-circular opening in the thwart, it would go down so it would lock the gear. If the ball was up against the port side of that aperture and made a hair trigger action, the hook wouldn't hold the weight, unless the gear had been out of use for a long time and possibly was corroded and stuck. I saw nothing of that condition when I examined it. As to the hair trigger situation, there is no telling just what position those three pins were in at the time of the accident. They may have been so nearly in line they would have carried a considerable weight until something disturbed the boat possibly the added weight and a little shift may have touched it off. To look at it with everything in proper condition those pins should all three be in line before that gear would lock. I say that from the interference of this seat in the life boat the device was so influenced that ordinarily the fall of the ball would not put the pins in direct line. I found the ball worked clear of the thwart in the other end of the boat. It was not fouled in the after end.

(34) ERNEST POSEY, a witness for the libellant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a master mariner. I hold license for any waters. I have been going to sea since 1912. Have been

master mariner since 1919. For two years I had a vessel that carried passengers as well as freight. I have been master of only Shipping Board vessels. I am United States Shipping Commissioner at Norfolk. I went with Mr. Kelsey to examine the releasing gear of a life boat at the Army Base—this life boat was situated away from the wall of the warehouse. There were two life boats there—one was against the wall completely fitted and the other out from the wall not fitted up. I examined the after release gear of that life boat. As to the condition I found it in, there seemed to be a lot of lateral play in the ball making it possible to move it laterally a good deal further than the other ball. Which may—would account for the fact it may have fouled that thwart which was situated closer to the ball in the after end than the forward thwart was to the forward end. In view of the fact that this ball fouled the thwart and the fact there was play in it, there would be great probability of the device fouling that thwart because the ball couldn't fall in a perpendicular position if it in any way rubbed against that thwart. The effect that would have on the device would be if it didn't fall in a perpendicular position it wouldn't be locked. If it was not locked and the boat swung out over the side, the boat would disengage and fall. If it was not locked, it wouldn't hold at all. I worked it down there in different positions. I found if it was just off the perpendicular a few degrees it would (35) catch and probably hold the weight until there was some joggling about the boat. Then it would disengage. I found at one angle nearly perpendicular it would hold weight. The device itself is all right—it is approved by the steamship inspection service. It's been tested and approved and if it is properly installed and in good working order it will work to hold the boat. Its proper performance was affected by the interference of that thwart and the fact there was too much play in the counter-balancing ball. May be the bushing was gone in the sheave; allows it to play back and forth. The thwart was too close and it would rub on the side of the thwart and hang probably. The ball is about as big as your hand. The opening in the thwart is large enough to permit it to pass. It seems some time it has given trouble before. It is cut out bigger than the one in the forward end. You can see where there are chisen marks where they

cut it out. That ball may have worked perfectly a hundred times and one time it would drag against that thwart and hang. Just that much play in it would allow it to do that. I have seen that device installed in other vessels. It does not always have to go through a hole in the seat in the boat, not unless that thwart up there forms the brace in the bow of the boat. Most boats are not constructed that way, not necessary to have that brace in the bow. If that case it would have nothing to interfere with it at all. It wouldn't be good judgment to install it so close to a thwart that it may foul a thwart—wouldn't be good judgment to put a thwart that close to a ball. I believe if that thwart had been put back, I mean forward, away from it, a few inches that device would have been all clear. These life boats are usually used in the roughtest kind of weather you have at sea. They are tested by the local inspectors and must be lowered with a full complement of passengers, 37 people on board, and they are liable to be lowered in heavy sea. That device wouldn't hold if not in working order. One end would trip. It must stand the roughest kind of use because it get the roughest kind of use.

CROSS EXAMINATION.

I examined this boat about a week ago, possibly ten days. It has the same style of releasing gear in both ends. The other boat alongside of it has the same style of releasing gear. Both boats are made exactly alike. These boats are a usual type of life boats for steamers. If this counter weight ball caught against this thwart, it would make a hair trigger on the release. If it caught there and made this hair trigger effect, the releasing hook wouldn't hold any weight. I tested the position of that ball in several positions and found a few degrees anywhere off the perpendicular it would engage and hold that steady weight, but any play—any steady jarring—would disengage it. I brought that out a moment ago. That is my theory, but I tested it in different positions. The fact that this particular boat fell made it evident that something gave way. I went down to determine in my own mind just what did give way. After eliminating everything else—(interrupted). That is the conclusion I came to. I am morally certain it is correct. If the

releasing gear was a certain angle off the perpendicular it would hang there. If it had been in perpendicular it would have held. It is the Broady releasing gear. It is one of the standing releasing gears and was in general (37) use some seven or eight years ago when these life boats were built. It is one of the approved style, by the steamboat inspection service. Aside from the fact that it had a thwart which it might strike as the counter weight ball went down and the fact there was some little play in the counter weight the thing was in good order and condition.

RE-DIRECT EXAMINATION.

I examined the other thwart in the same boat. That thwart was farther away from the device and there wasn't so much lateral play in the ball. The bushing was good. Referring again to this after device, I don't recall that there was anything on the ball itself to indicate it might have fouled that thwart. But I do recall noticing some chisel marks on the thwart, where they dug it out. It evidently fouled before and some one chiseled it larger. If it falls perpendicular it will hold. In practice aboard ship, I don't know if I had been in command of that boat—I would just give that device a casual glance unless I were familiar with that boat and knew it was not absolutely perpendicular. Then I would have put my hand on it and forced it perpendicular. The fact that it fell and eliminating everything else indicates it was not perpendicular. That is my surmise.

Libellant rests.

(38) CHARLES G. RICKARDS, recalled as a witness for the respondents, testified as follows:

DIRECT EXAMINATION.

I am familiar with this Broady releasing gear. I have seen similar gear a number of times . At the time the No. 4 boat on the "Hybert" was rigged the rigging and falls and releasing gear were in good order, properly rigged. I can't say whether or not it is a fact that the counter weight ball on this releasing gear would go

through this—go by this opening in the thwart. I never noticed. If it went through and went down it would lock the gear. My experience has been with them unless they are absolutely right they won't hold any weight. Just as soon as you lifted the boat they fall. The fact that it would hang on the davits two or three hours would indicate to my mind that it was properly hung the first place. In my experience I have never had one fall like that. I have never seen one that was not hooked by reason of the fact that the ball would not fall on the perpendicular. I have seen them not hooked for reasons of being corroded, such as that. But then if it was hung by the falls, on hoisting, putting a strain on it, the boat would fall. It wouldn't hold any weight unless it was hooked. I have seen them installed just exactly the same as this boat; but all life boats have an after and forward thwart on top of the air tank more or less to brace the body and protect the tank. In some cases the thwart will come towards the end of the boat more than others. In that case they cut out a half moon shape to allow the ball to drop when it is supposed to drop. Both of these boats at the Army Base are rigged that way, with thwarts (39) at the end with half moon shape holes.

O. J. YOUNG, a witness for the respondents, being duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is O. J. Young and I am port captain of the Shipping Board at Norfolk, and was a year ago when this accident happened on the "Hybert". I am fairly familiar with the life boat No. 4 which was on the "Hybert" at the time of the accident. I understand that it was equipped with the Broady releasing gear. That gear has been approved for use on life boats by the steamboat inspection service. I had notice of this accident shortly after it occurred. I was on the ship at the time. I made an examination of the releasing gear on the after end of that boat probably two hours after the accident happened. I found the releasing gear on No. 4 boat at that time had been, of course, released—unhooked —and that it had splinters of wood on the hook; on the releasing hook, and some spots of red paint on the hook.

The hook itself was painted lead color. I think the hook was lead color. I examined it to ascertain what it's condition was and found it apparently in good order. Saw nothing broken. We made tests of it the next day. We made tests of this hook on this boat the next day. We found on that occasion nothing broken about the hook and that it was working free. The hook locked when the counter weight ball dropped in its proper position. I didn't observe that there was any difficulty in having that counter weight ball drop in its proper position. It wouldn't hold weight if the ball was held up in any way. The ball must be in absolute right position to hold the boat in the first place. It is intended that way. That (40) controls that trigger as I call it. If the ball wasn't in proper position it would have unhooked before the boat was off the deck. If the boat had been swung on the davits for two or three hours in the first place, and later three men were working in it, and this weight had been hung by this hook, it would indicate to my mind that everything was in good proper position. Otherwise it would have given way when they first swung the boat up. We tested this counter weight ball to determine whether or not it would fall freely through this opening in the thwart. We found it would fall freely through the opening. It didn't foul. It is hinged on a pin and there is some lateral play in that as on any rivet. It isn't as tightly set as your knife blade, for instance. There must be some play. It is natural play; it isn't bushed. It is left slack on purpose. It mustn't be tight so as to freeze. There are two pieces of metal together. I didn't notice there was any more than a normal play there, than there is on the ball at the other end of the boat. I would say if the ball catches on the thwart and doesn't go down, then the releasing gear won't hold any weight. The Hybert was built at Wilmington, N. C. Came out in 1920. And came to Norfolk in 1922 and was laid up in the James River some time during '22. She was out for two years. While in the James River the Shipping Board keeps men on the vessels to keep them in good condition. She had been maintained in fair condition as to paint. There was no corrosion on this device. The device had been painted. The boats had been painted inside and the releasing gear, of course, painted, protecting it from rust so much that we did not paint

those boats when we broke her out. We didn't need to paint them. The releasing gear worked the same on that (41) boat as on any other boat.

CROSS EXAMINATION.

It occurs to me in thinking of the colors of this hook and the boat that the boat is painted red inside, and the strips—strips of wood on the side—are painted lead color. The device is lead color, I believe. There are two different colors. Strips painted one color and the device is painted another. One is red, another lead color. When I made this test of the boat, Life boat No. 4, it was taken from the davit and landed on the deck of the lighter at Colonna's and the lighter shoved around to the other side of the pier, 2 or 3, whatever it is. The next morning—next day—a survey was made of that boat by different interested departments, salvage and Shipping Board boat inspectors and other representatives. I was there that *mroning* when they were holding the survey. I am not sure at this time that I worked that device myself right at that time. There were many there and it was being operated. I don't think that I had my hands on it the next morning. When she was on the dock, she was sitting as near as possible on an even keel. I wouldn't say whether she was sitting on an even keel that morning or not. I assume it would depend a good deal on whether a boat is on an even keel or whether she is listing, whether or not this devise would drop through the hole. Just as she is sitting there now. If the boat was listing over to the opposite side, I assume it would have a tendency to drop clear of the place it fouled. I believe we sent one of our launches up there and brought her to the base on the launch; and she was put in the warehouse and is in practically the same condition today as she was when the accident happened. Little accumulation of dust and dirt. She has been in an (42) enclosed warehouse where it is perfectly dry, and in the same condition she was in when we put her there. So far as I know there has been no change made in her condition. As to why they were inspecting this device to see whether or not it dropped through that slot, I never heard any one at the time of the survey remark about there not being play enough in the opening in the

thwart for that ball to pass through. It operated without landing on either one side or the other to attract their attention. The survey board was just as anxious as anyone to determine the cause and I believe at the time if they saw that was a reason they would have noted it and spoken about it because there were many different interested parties there and as far as I saw the ball worked through that opening without interference. To be honest, I don't know that I had my hands on it at that time or made any special investigation for that purpose.

RE-DIRECT EXAMINATION.

I was there, however, to ascertain the condition of the releasing gear and see how it worked and whether it worked. And saw that it did work. The Shipping Board maintains a Sea Service Bureau. The seamen who are engaged here by the Shipping Board are engaged through the Sea Service Bureau. A. B. Seaman have a rating.

Mr. KELSEY: I don't understand there is any question about that. Why are you bringing this out?

Mr. LITTLE: Well, you asked what rating they had.

Mr. KELSEY: There has been no denial they were A. B. seamen.

(43) JOHN LUMFORD, re-called as a witness for the respondents, testified as follows:

DIRECT EXAMINATION.

When I wound out the No. 4 life boat on the morning of this accident on the Hybert, I didn't have anything to do with the falls. I just hauled the boat out with the movement of the davits. And in order to do that the weight of the boat came upon the falls. It being pulled out from the chocks to the outside. At that time the releasing gear was in proper condition.

CROSS EXAMINATION.

I noticed the releasing gear was hung properly. When I first got there the boat was sitting in the racks.

I noticed it was hung properly before I wound it out. Otherwise I couldn't wind it out. I looked to see if the hook was through the ring. Looked at the falls, see if they were made fast properly. All I did was to see if it was hung properly. I didn't go inside that life boat and work that releasing gear; but I couldn't wind the boat out unless it was hooked properly. There is no question about the fact that the ring was in the hook when I swung the boat out. If the ring hadn't been on the hook it wouldn't have gone out.

Respondents rest.

STIPULATION OF PROCTORS APPROVING NARRATIVE OF EVIDENCE.

(44) It is stipulated and agreed by and between proctors for the respective parties that the foregoing statement of evidence in narrative form is all of the testimony before the Court in the matter of the libel of C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, against Colonna's Shipyard, Incorporated, and United States of America, and is a true and correct statement thereof.

H. H. RUMBLE,
Special Assistant to the Attorney General,
Proctor for the United States of America, Appellant.

L. B. COX,
OAST, KELSEY & JETT,
Proctors for C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, One of the Appellees.

HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc., One of the Appellees.

CERTIFICATE OF THE COURT AS TO THE EVIDENCE.

(45) I, D. Lawrence Groner, United States District Judge for the Eastern District of Virginia, do hereby certify that the above statement of evidence in this case in narrative form, which has been prepared and agreed

to by proctors for the respective parties, appears to be true, complete and properly prepared, and the same is hereby approved.

Given under my hand this 16th day of February, 1928.

D. LAWRENCE GRONER,
United States District Judge.

OPINION OF THE COURT.

(46) Filed October 26, 1927.

C. A. Lindgren, Administrator,
vs.
Colonna's Shipyard, Inc., and The United States of America. } In Admiralty.

I deferred a decision in this suit that I might consider the two questions which seemed to me to be decisive. First, whether the doctrine of *res ipsa loquitur* applies, and secondly, whether, irrespective of this doctrine, actionable negligence (I. E. unseaworthiness) was shown by the evidence.

It is conceded that the life boat from which deceased fell was swung over the ship's side and suspended on the ship's davits with its keel about flush with the ship's boat deck, and that deceased, in the discharge of his duties, got into the boat at a time when two other members of the crew were at work in the boat, and that shortly after he entered the boat, the line from the davit to the stern of the boat became released allowing the stern to fall throwing the men out and resulting in the death of all of them. The boat was equipped with an appliance known as the Broady Releasing Gear. This is a patented device which is intended to secure the lines with which the life boat is lowered from the deck of the vessel while in the process of lowering and to disengage the lines quickly when the life boat has reached the water. The device has been tested in use and found entirely satis-
(47) factory and no point is made that it will not accomplish its purpose with reasonable safety when properly installed in good condition and properly used. It is

not contended on part of the defense that deceased assumed the risk of injury. He had notihng to do with attaching the lines from the davits nor with the swinging of the life boat over the side of the vessel, and he was totally unfamiliar with the condition of the device or the manner of its installation since the day of the accident was his first day of work on this vessel. The life boat had hung over the side of the ship in the ordinary way and without accident to any one for at least an hour before he entered it to do the work which he was engaged in doing when the accident occurred. During all of this time two men had been working in the boat and there was nothing to put him on notice of danger. He had a right to assume as a matter of fact as well as a matter of law that the apparatus by which the life boat was held in its suspended position was in good order. The evidence taken upon the trial tends to show that at the stern of the life boat the device is installed in such a way as to require an opening about four inches square in the thwarts of the life boat which apparently were originally built in the stern of the life boat to serve about the same purpose as to strengthening the boat as a transverse bulkhead would. The purpose of the opening is to allow a counter-weight ball, which when in proper position locks the hook, which is a part of the attached appliance, to the ring in the falls or lines used to lower or lift the boat, to fall into place and thus lock the device. Two expert witnesses examined for the libellant testified that, either because the device itself was not installed in exact alignment or else because the opening was not con-
(48) structed with reference to the perpendicular fall of the ball, the counter-weight ball when thrown into action wedged against one side of the opening so that instead of the locking device completely operating and the connection between the shank lever and the hook and the extension and the link and the link and the supporting bracket being in alignment, they were out of alignment and the result was, as a witness described it, to create a sort of hair-trigger arrangement which instead of being so locked as not to be capable of being disengaged except by means of the release lever, was in condition where a sudden jar or added weight would probably disengage the ring from the hook and release the lines.

I personally inspected the life boat and there is no doubt about the fact that the stern gear is so attached as that the counter-weight ball does not fall clearly through the opening but is inclined to strike against the left-hand side and wedge in this position unless some slight power is applied to throw it fully into place. As thus suspended the locking device applied but to what extent it was impossible in the experiments made in my presence to determine since there was neither opportunity nor means at hand to apply a sudden jar (as of a person jumping into a boat) or added weight but it was obvious to all who witnessed the experiments that as thus partially locked the hook was readily released by the application of slight pressure whereas when fully locked this was not the case. The device itself, I think, was in good condition and when the counter-weight ball was thrown fully into place, in proper alignment, but on the other hand I think it reasonably clear that when not thrown into place, or when allowed to stick, the intended result was not accomplished and the completion of the locking device not consummated, and this, I think, is what must have occurred at the time of the accident for otherwise what resulted would be inexplicable, and if this be true, it seems to me necessarily to follow that the installation of the device being negligent because of the failure to install in alignment or make the opening suffi-
(40) ciently large, the device was unseaworthy, and in this view of the case, libellant is entitled to a recovery.

For this reason I have not discussed the doctrine of *res ipsa loquitur* though doubtless that doctrine, if applicable at all in determining the seaworthiness of a vessel, would apply for in this case the appliance from which the injury resulted was under the management of respondent, the United States, and the accident in the ordinary course of things would not have happened if those in charge had used proper care either in its installation or operation. The doctrine has been applied most frequently in the case of elevator accidents, and in all of such cases, the accident for which recovery was allowed was one which ordinarily would not have happened except for the lack of due care, and that condition obtains equally in this case.

I believe, however, that it is not necessary in this case to invoke this doctrine since the conclusion I have

reached meets the requirement of the law which imposes upon the person having the affirmative the duty of proing by a preponderance of the evidence that the injury was caused as the result of the failure to discharge a legal duty.

On the question of the amount of damages recoverable the case presents difficulty growing out of the fact that deceased left no dependents. He had neither father, mother, children, brothers, nor sisters, and those entitled to his estate are a niece and a nephew. Under the Merchant Marine Act, applying the rule under the Federal Employers' Liability Act, there could be no recovery since there was no dependency, but under the Virginia statute giving a recovery limited to ten thousand dollars in case of death, dependency is not a necessary condi-
(50) tion, but the probable earnings of deceased considering his age, capacity, experience, etc., may be shown. In this case deceased was in his fiftieth year and was earning one hundred and twenty-five dollars a month. Having due regard to his probable future earnings, I think it is fair under all of the circumstances to enter judgment against the United States in the sum of five thousand dollars.

The libel as against the Colonna Shipyard will be dismissed, counsel for libellant conceding at Bar that no case was made against it.

FINAL DECREE.

(51) Entered and filed October 31, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, Deceased, Libellant, v. Colonna's Shipyard, Incorporated, a corporation, and United States of America, Respondents.	In Admiralty.

This cause came on this day to be heard upon the

libel, the answers thereto of United States of America and Colonna's Shipyard, Incorporated, and the evidence adduced in open court, and was argued by proctors;

After mature consideration thereof, the Court being of the opinion, as set forth in writing and filed herewith, that the decedent's death was the result of defective installation of the releasing gear in the life boat of the Steamship "Hybert", owned by the United States of America, permitting the said life boat to fall and precipitate the decedent to the dry dock below, that the device was therefore unseaworthy, that the said C. A. Lindgren, Administrator of the Estate of C. E. Barford, Deceased, is entitled to recover from the United States of America damages under the statutes of this state providing for the maintenance of suits for damages on account of death of a person caused by the wrongful act of another, that damages for decedent's death should be fixed at the sum of Five Thousand ($5,000.00) Dollars, and that Colonna's Shipyard, Incorporated, was not responsible for the decedent's death and the libel against it as to it should be dismissed;

It is ADJUDGED, ORDERED and DECREED that C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, do recover of and from the United States of America the sum of Five Thousand ($5,000.00) Dollars, with interest at the rate of four (4%) per cent per annum from this date until paid, and his costs in this behalf expended as taxed by the Clerk of this Court.

And it is further ORDERED that the libel filed herein be and the same is hereby dismissed as to the said Colonna's Shipyard, Incorporated, and that it recover its costs.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Va.

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

(52) Filed January 17, 1928.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of the Court aforesaid:

Your petitioner, United States of America, one of the respondents in the above entitled cause, respectively represents that it is aggrieved by a final decree entered herein on the 31st day of October 1927, by the District Court of the United States for the Eastern District of Virginia, at Norfolk, and petitioner assigns the following errors:

The Court erred:

(1) In over-ruling the exceptions of this respondent to the libel filed in said cause.

(2) In failing to hold that this case was and is governed by Federal statutes to the exclusion of state statutes.

(3) In failing to hold that the rights of the libellant were and are governed by the laws of the United States, namely, Section 20 of the Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920, known as the "Merchant Marine Act, 1920", and that the remedy provided by said laws is exclusive.

(4) In failing to hold that Congress having by the aforesaid statutes and by the Act of March 30, 1920, legislated upon the subject of death by wrongful act as respects seamen and death by wrongful act upon the high seas, the remedies provided by said statutes are exclusive and state statutes purporting to give a remedy in such cases do not apply.

(5) In holding that the libellant was and is entitled to recover of and from this respondent notwithstanding the fact that the libellant's intestate, the said C. A. Barford, left no widow, children, parents, next of kin, or other person dependent upon the said intestate.

(6) In holding that in order to recover, it was not necessary that libellant allege and prove that his said intestate left any such person dependent upon said intestate.

(7) In entering judgment against the United States of America in favor of libellant.

WHEREFORE, for these and other errors, apparent upon the face of the record, petitioner hereby appeals from the whole of said decree to the United States Cir-
(53) cuit Court of Appeals for the Fourth Circuit; and prays that the same, together with a full transcript of the record may be sent to the said Court without delay and that said Court will proceed to hear said cause; that said decree may be reversed and a decree entered dismissing the said libel and that petitioner may have all such other, further and general relief as in law and justice it may be entitled to receive.

UNITED STATES OF AMERICA,
By H. H. RUMBLE,
Special Assistant to the Attorney General.

STIPULATION AS TO PRINTING OF THE RECORD.

(54) Filed February 18, 1928.

It is stipulated and agreed by and between proctors for the respective parties that the Clerk of the United States District Court for the Eastern District of Virginia shall make up the transcript of the record in this case in accordance with the stipulation of the proctors and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, to be

printed under the supervision of the Clerk of that Court in accordance with Rule Twenty-three.

H. H. RUMBLE,
Special Assistant to the Attorney General,
Proctor for the United States of America, Appellant.

L. B. COX,
OAST, KELSEY & JETT,
Proctors for C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, One of the Appellees.

HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc., One of the Appellees.

STIPULATION OF COUNSEL AS TO THE CONTENTS OF THE RECORD.

(55) Filed February 18, 1928.

(Title omitted.)

It is stipulated and agreed between proctors for the respective parties that the record in this case upon appeal shall consist of the following:

(1) The libel of C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, with interrogatories thereto attached.

(2) The exceptions filed on behalf of the United States of America to the said libel.

(3) The order overruling said exceptions.

(4) The answer of the United States of America to said libel.

(5) The separate answer of Colonna's Shipyard, Incorporated, to the said libel.

(6) The evidence in narrative form and the exhibits therewith to be sent up as originals.

(7) The opinion of the Court.

(8) The final decree and all other orders in the cause.

(56) (9) The petition for an appeal, assignments of errors, order allowing the appeal, and all other appeal papers.

H. H. RUMBLE,
Special Assistant to the Attorney General,
Proctor for the United States of America, Appellant.
L. B. COX,
OAST, KELSEY & JETT,
Proctors for C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, One of the Appellees.
HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc., One of the Appellees.

MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD.

(57) 1. Petition for appeal filed January 17, 1928.

2. Order allowing appeal entered January 17, 1928.

3. Citation. Legal service accepted.

CERTIFICATE OF THE CLERK.

(58) UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the proceedings and judgment of said Court, as stipulated by counsel, in the above entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Norfolk, in said District, this 22nd day of February, A. D. 1928.

JOSEPH P. BRADY,
Clerk, U. S. District Court.
By PAUL R. FLANAGAN,
Deputy Clerk.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 2719.

United States of America, Appellant,

versus

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, and Colonna's Shipyard, Inc., a corp., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

February 24, 1928, the transcript of record is filed and the cause docketed.

Same day, the original exhibits (Blue prints) are certified up.

Same day, the original petition for appeal, order allowing appeal and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Paul W. Kear, United States Attorney, and H. H. Rumble, Special Assistant to the Attorney General, is entered for the appellant.

March 2, 1928, the appearance of D. Arthur Kelsey and L. B. Cox is entered for the appellee C. A. Lindgren, Administrator, etc.

March 16, 1928, twenty-five copies of the printed record are filed.

March 20, 1928, stipulation of counsel as to the time for the filing of their respective briefs is filed.

STIPULATION THAT NO CLAIM OF ERROR WILL BE ASSERTED AGAINST APPELLEE COLONNA'S SHIPYARD, INCORPORATED.

Filed March 20, 1928.

(Style of Court and Title Omitted.)

It is stipulated and agreed between counsel for the respective parties that upon this appeal no claim of error in the decree of the District Court insofar as the defendant, Colonna's Shipyard, Incorporated, is concerned, will be asserted, and that it will not be necessary for Colonna's Shipyard, Incorporated, to file any brief in connection with such appeal.

H. H. RUMBLE,
Attorney for United Sfates.
L. B. COX,
KELSEY & JETT,
Proctor for Lindgren, Administrator.
HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc.

ARGUMENT OF CAUSE.

May 2, 1928, (April term, 1928,) cause came on to be heard before Waddill, Parker and Northcott, Circuit Judges, and is argued by counsel and submitted.

OPINION.

Filed October 16, 1928.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 2719.

United States of America, Appellant,

versus

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, and Colonna's Shipyard, Inc., a corp., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued May 2, 1928. Decided October 16, 1928.)

Before WADDILL, PARKER and NORTHCOTT, Circuit Judges.

ARTHUR M. BOAL, Admiralty Counsel, U. S. Shipping BOARD (PAUL W. KEAR, U. S. Attorney, and H. H. RUMBLE, Special Assistant in Admiralty to the Attorney General, on brief) for Appellant, and D. ARTHUR KELSEY and L. B. Cox (KELSEY & JETT on brief) for Appellees.

PARKER, Circuit Judge:

This is an appeal from a decree in Admiralty in favor of the Administrator of one C. E. Barford and against the United States as owner of the Steamship Hybert, one of the Shipping Board vessels. The suit was commenced by libel *in personam* filed under the Suits in Admiralty Act, to recover damages for the death of Barford. The libel alleged that decedent was a seaman employed as third mate on the Hybert and that his death was caused by the negligence of the officers and employees of the government who had the vessel in charge. There was no allegation, however, that decedent left surviving him any widow or children or parent or next of kin dependent upon him or that the suit was instituted in behalf of such dependents. An exception was filed to the libel because of the lack of such allegation; and, upon the exception being overruled, it was established upon the hearing that decedent left no dependents and recovery was opposed because of that fact. The District Judge was of opinion, however, that libelant was entitled to recover under the Virginia death statute (Section 5786 of the Code of Virginia); and, as dependency is not required for recovery thereunder, he entered a decree for libelant. No question is raised, on the one hand as to the death of decedent having been caused by the negligence alleged or, on the other, as to his having left no dependents. The question in the case is whether his administrator is entitled to recover under the statute of Virginia, which does not require a showing of dependency, or whether the right of recovery given by the Merchant Marine Act of 1920 in cases of wrongful death (41 Stat. 1007, 46 U. S. C. A. 688) is exclusive.

There can be no question that, prior to the passage of the Act of 1920, the Virginia Statute would have been applicable. Prior to that act there was no liability for wrongful death under the general maritime law, Con-

gress had not legislated upon the subject, and, in the absence of legislation by Congress, Courts of Admiralty applied the death statutes prescribed by states where death occurred. *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Lewis* v. *Jones* (C. C. A. 4th), 27 Fed. (2d) 72; *The Anglo-Patagonian* (C. C. A. 4th), 235 Fed. 92. It is clear that so long as Congress had not exercised the power given it under the Commerce Clause of the Constitution to legislate with respect to the liability in such cases, the states might occupy the field; but it is equally clear that as soon as Congress acted the legislation of the states was superseded and that of Congress became supreme and exclusive. *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 Howard 298, 317, *et seq.*; *County of Mobile* v. *Kimball*, 102 U. S. 691, 698-699; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 54. As was said by Mr. Justice Matthews in *Smith* v. *Albama*:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

The situation with respect to the right of recovery in cases such as this is exactly the same as in cases arising out of the death of railway employees while engaged in interstate commerce. Prior to the enactment of the Federal Employers Liability Act, Congress had left the question of the liability of employers in such cases to be determined by the laws of the several states; but upon

the passage of that act it was held that all state laws and rules upon the subject were superseded and that the rights of parties with relation thereto were to be determined solely by reference to the Federal Act. *Second Employers' Liability Cases, supra; Mich. Cent. R. Co.* v. *Vreeland*, 227 U. S. 59; *Gulf, Etc., R. Co.* v. *McGinnis*, 228 U. S. 173; *N. C. R. Co.* v. *Zachary*, 232 U. S. 248, 256; *S. A. L. Ry.* v. *Horton*, 233 U. S. 492. In the *Second Employers' Liability Cases*, Mr. Justice Van Devanter said:

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. * * * The inaction of Congress, however, in no wise affected its power over the subject. * * * And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

The Merchant Marine Act of 1920 covered fully the right of the personal representative of a seaman to recover from his employer for personal injury resulting in death. Section 33 of that act (41 Stat. 1007, 46 U. S. C. A. 688) provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in

such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

As will be seen, the effect of this act was to incorporate into the maritime law the statute applying to injuries to railway employees engaged in interstate commerce. The constitutionality of the statute was upheld in *Panama R. Co.* v. *Johnson*, 264 U. S. 375, and it was there interpreted as modifying the substantive maritime law so that the rights thereby conferred might be enforced either in a court of admiralty or in a court of law. Answering an argument that the statute was invalid because it restricted the enforcement of the rights conferred to actions at law and thereby encroached upon the admiralty jurisdiction Mr. Justice Van Devanter, speaking for the Court, said that if such an interpretation were placed upon the statute a grave question would arise as to its constitutional validity, and that it should be interpreted as meaning that the injured seaman should have the benefit of the new rules if he sued on the admiralty side of the court as well as if he had sued at law. He said:

"The course of legislation, as exemplified in section 9 of the Judiciary Act of 1789, sections 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and sections 24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace. It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed

that intention in terms benefitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury', the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words 'in such action' in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for such injuries', the emphasis being on the object of the suit rather than the jurisdiction in which it is brought."

The statute which was thus incorporated into the maritime law and which conferred upon the injured seaman, or his representative if his injuries resulted in death, rights which might be enforced either in an action at law or a suit in admiralty, clearly provides that there can be a recovery in case of death only where there is a showing of dependency. 35 Stat. 65; *Gulf, etc., R. Co.* v. *McGinnis, supra; N. C. R. Co.* v. *Zachary, supra.* And, in the light of the authorities cited above, we think that the statute must be deemed exclusive and to supersede all state legislation bearing upon the subject.

It is said that the injured seaman is given an election to proceed either under the old law or under the statute. This is correct when it is understood as meaning that the election is to proceed under the old maritime law or under the statute. See *Plamals v. The Pinar Del Rio,* 48 Sup. Ct. 457. But it does not follow from this that the personal representative of a seaman may re-

cover for wrongful death under a state death statute merely because prior to the Merchant Marine Act the state statute was applied by courts of admiralty in the absence of any other law to apply. Such statutes were not a part of the general maritime law, they were recognized only because Congress had not legislated on the subject, and, as shown above, as soon as Congress did legislate, the remedy which it prescribed became the exclusive remedy. When it is said that the injured employee may proceed under the old law, it is meant that he may invoke the rules of the maritime law as to wages, maintenance and cure (264 U. S. at 391), not that he may invoke state statutes covering a field which has been entered by Congress, and which prior to the act of Congress were enforced by courts of admiralty only because Congress had not entered the field. It is unthinkable that Congress should have intended that in addition to the rule prescribed by the Merchant Marine Act the parties should be subjected to the rules prescribed by the legislatures of the forty-eight states.

Since, therefore, libelant cannot recover for the death of the deceased seaman under the Virginia death statute, but must proceed under the Merchant Marine Act of 1920 making applicable the provisions of the Federal Employers' Liability Act, and since dependency must be shown as a condition to recovery thereunder and it is admitted that deceased left no dependents, it is clear that the libel should have been dismissed.

The point is made that the Merchant Marine Act has no application because it is said that decedent was not a seaman but a mere shipkeeper of a ship out of commission. It was alleged in the libel, however, and admitted in the answer that at the time of his death decedent "was engaged in his duties as third mate and as such a seaman on said steamship." There was nothing anywhere in the pleadings contradictory of this allegation; and no amendment was asked or allowed. It

would seem, therefore, that decedent's status as a seaman for the purposes of the suit was conclusively determined. *Wigmore on Evidence* (2nd Ed.), Vol. 2, p. 536. But if we ignore the pleadings and look only to the evidence, there can be no question as to decedent's status as a seaman within the meaning of the Merchant Marine Act. The Hybert had been laid up, it is true, but sometime prior to the death of decedent she had been taken to the dry dock and was undergoing repairs preparatory to a voyage. Decedent was employed as third officer and came on duty for the first time on the morning of his death. At the time he received the fatal injury he was engaged in preparing the vessel for sea.

A seaman was defined by Congress in the Act of June 7, 1872, as any person employed or engaged to serve on board a vessel. R. S. 4612, U. S. C. A. 713. And in construing the Merchant Marine Act here under consideration the Supreme Court has held stevedores to be seamen within the meaning of the act because engaged in maritime service formerly rendered by the ship's crew. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50. In that case the Court said:

"We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other."

Certainly seamen employed to take a ship to sea who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the act merely because the vessel is not commissioned at the time. See *The Progresso,* 46 Fed. 292; *The William Leishear,* 21 Fed. (2d) 862. In this case the appli-

cation of the act happens not to be beneficial to the representative of the seaman; but of course its applicability is not to be determined by that circumstance.

Our conclusion is that the decree below should be reversed and the libel dismissed.

Reversed.

DECREE.

Filed and Entered October 19, 1928.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 2719.

United States of America, Appellant,

vs.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, and Colonna's Shipyard, Inc., a corp., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Norfolk, with directions to dismiss the libel.

JOHN J. PARKER,
U. S. Circuit Judge.

October 19, 1928.

On another day, to-wit, November 19, 1928, the mandate of this Court in this cause is issued and transmitted to the U. S. District Court at Norfolk, Va., in due form.

Same day, the original exhibit (Blue Print) is returned to the Clerk at Norfolk, Va.

Same day, the original petition for appeal and order allowing appeal are returned to the Clerk at Norfolk, Va.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain among the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 5th day of January, A. D., 1929.

(Seal of Court)

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for ths Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.